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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID G. BRONNER,
Petitioner,
v.
DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Alabama

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether, consistently with the guarantees of freedom of speech in the First Amendment as embodied in the Fourteenth, a state's highest court may reverse a summary defamation judgment in favor of a defendant and against a public official on the ground that a "glimmer, spark or scintilla of evidence" is sufficient to create a triable issue of fact as to whether the defendant's statements, if false, were made with knowledge of falsity or reckless disregard of whether false or not?

2. Whether, consistently with the constitutional guarantees described in question 1, in a defamation action a state's highest court must determine whether the plaintiff is a public official or public figure within the federal rule of libel and as defined in a uniform manner consistent with the constitutional protection of free speech and press guaranteed by the federal rule enunciated in *New York Times* v. *Sullivan,* 376 U.S. 254?

3. Whether, consistently with the constitutional guarantees and in the circumstances described in question 1, summary judgment is essential to safeguard freedom of speech from the chilling effect of a spurious defamation action—supportable, if at all, by a flicker, gleam or scintilla of evidence?

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[1] The parties to the proceedings in the Supreme Court of Alabama were: David H. Fulton and William B. Wyatt, Appellants there and Respondents here; and Petitioner, Bronner and The Advertiser Company, Appellees there.

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OPINIONS BELOW

The opinion of The Supreme Court of Alabama is reported at 14 Alabama Bar Reporter 2651 and appears as Appendix A hereto; the opinion of the trial court, the Circuit Court of Montgomery County, Alabama of October 30, 1979, appears as Appendix B hereto.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 19, 1980. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The judgment of the Supreme Court of Alabama in these consolidated defamation actions reversed a summary judgment of the Circuit Court of Montgomery County ("trial court") in favor of petitioner, David G. Bronner, then Finance Director of the State of Alabama, and a co-defendant, The Advertiser Company, a newspaper publisher ("Advertiser").[1] Respondent Wyatt, recently discharged deputy director of the State Building Commission of Alabama ("Commission"), had brought a defamation action against Bronner seeking compensatory damages of $100,000 and punitive damages of $1,000,000; and respondent Fulton, a recently discharged building inspector of the Commission, had brought one seeking compensatory damages of $200,000 and punitive damages of $2,000,000. The claims for defamation, as will more fully appear, arose out of statements made by Bronner at a news conference held on May 29, 1979.[2] Although the summary judgment was based upon Bronner's defense of qualified executive privilege, among the

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[1]A separate petition for certiorari is being filed contemporaneously by Advertiser.

[2]Respondent Wyatt sought compensatory damages against Advertiser of $100,000 and punitive damages of $1,500,000; and respondent Fulton sought compensatory damages of $200,000 and punitive damages of $2,000,000 against it. These claims arose out of Advertiser's press coverage of this news conference.

other "numerous" defenses asserted by Bronner in his pretrial motions was that a summary judgment was essential to avoid the abridgment of his freedom of speech guaranteed by the First and Fourteenth Amendments. Moreover, in the court below, Bronner again asserted in his brief that the summary judgment entered by the trial court was essential to avoid the abridgment of that freedom, and that the judgment in his favor was mandated by *New York Times* v. *Sullivan,* 376 U.S. 254, and its progeny.[3] The Supreme Court of Alabama rejected this constitutional assertion; reversed the summary judgment for Bronner; and remanded for trial what it deemed to be a genuine issue of material fact. This case is ripe for review here. See *Time, Inc.* v. *Pape,* 401 U.S. 279, 283-284, (where this Court reversed a judgment of the Court of Appeals which had reversed the district court's grant of a directed verdict for the magazine); and *Miami Herald Pub. Co.* v. *Tornillo,* 418 U.S. 241, 246-247.

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[3]Bronner's brief in the court below contained the following:

> "Although the trial court found it unnecessary to reach the point, Bronner and Advertiser strongly urge here, as there, that the current law of libel in Alabama, *Mobile Press Register* v. *Faulkner,* (Ala.) 372 So.2d 1286, as mandated by *New York Times* v. *Sullivan,* 376 U.S. 254 and its progeny, constitutionally required the summary judgment below. Even if the statements made by Bronner and reprinted in Advertiser had been false, they are not actionable unless Bronner and Advertiser knew they were false or made them with reckless disregard of whether they were false or not.
>
> "The *Sullivan* doctrine applies because Wyatt and Fulton were public officials; and because, even if they were not, they seek punitive damages. *Gertz* v. *Robert Welch,* 418 U.S. 323; *Mobile Press Register* v. *Faulkner, supra* at 1284.
>
> "The determination of whether a libel or slander plaintiff is a public official or public figure is a question for the court. *Mobile Press Register* v. *Faulkner, supra* at 1284. Wyatt as deputy director of the State Building Commission is surely a public official within the test of the leading case, *Rosenblatt* v. *Baer,* 383 U.S. 75; and building inspector Fulton is as much a public official as the manager of a county ski lodge in *Rosenblatt.* In *Beckley* v. *Hanks,* 389 U.S. 81 the clerk of a state court was held to be a "public official" under the *New York Times* rule. Many state and federal decisions accord."

The nature of the alleged defamation and of the "genuine issue" for trial involved the following circumstances. Bronner, newly appointed Finance Director on March 14, 1979, became by virtue of that appointment a member of the Alabama Building Commission and chairman of a special committee charged with supervising the personnel and financial affairs of the technical staff of the Commission.[4]

Because of widespread complaints regarding long standing mismanagement, one of Bronner's earliest undertakings was an investigation designed to evaluate these reports and the performance of the Commission and its technical staff and personnel. Bronner, jointly with other public investigators, conducted an extensive investigation into the activities and affairs of the Commission, its director of technical staff, its deputy director (respondent Wyatt) and its employees. The investigation including oral examinations under oath.

Bronner's extensive, and uncontroverted affidavit (Appendix C to this Petition) details the relevant results of this investigation. After it had been concluded, the Commission discharged the Director of Technical Staff, one Hugh Adams; its deputy director, respondent Wyatt; three building inspectors, respondent, Fulton, Allen and Martin; and one other employee. Thereafter, Adams and Martin filed slander actions against Bronner; and Wyatt and Fulton filed these actions. Subsequently, Adams pleaded guilty to a criminal indictment for perjurious grand jury testimony that "he never received any monetary payments in the building industry;" and he dismissed his action. Martin did not appeal from a summary judgment in favor of Bronner.

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[4]The technical staff of the Commission reviewed all architectural and construction agreements, architects statements, contractors estimates, material statements and change orders relating to buildings and capital improvements of the State of Alabama.

As recited in the opinion of the court below, on May 29, 1979, Bronner conducted a news conference. His written statements and the portion of Bronner's uncontradicted affidavit regarding his oral statements[3] are quoted in the opinion below. (Ms. 3-4) Although the content of Bronner's written and oral statements is undisputed; and although, without dispute Bronner stated at this news conference that he had made no charges, let alone criminal charges, "about any one . . . they were dismissed because of qualifications and performance", the Supreme Court of Alabama nevertheless found a genuine issue for trial of these multimillion dollar defamation actions on the issue of whether the words Bronner used "imputed criminal activity and guilt of all four categroies of misconduct to both Wyatt and Fulton." (Ms. 16)

Respondent, Wyatt—the deputy director with significant supervisory duties over the state agency during the period involved and the subject as well of sworn testimony of misconduct—and respondent, Fulton—whose performance as one of too many building inspectors was subpar—were unable to meet the extensive Bronner affidavit (Appendix C) or even those portions specifically directed to them. Instead, their affidavits recited that they were not guilty of any of the accusations made against them and that they had performed their duties in a good and professional manner and had never been subjected to discipline or criticism. And their affidavits contained irrelevant assertions that they had committed no crimes; had never received any kickbacks or illegal payments; that they had never been subjected to prior criticism and had no reason to believe that there was dissatisfaction with their performances; that they had not been informed that an investigation was being directed at them; and that they knew of no persons on the Commission who were taking bribes or kickbacks or illegal payments.

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[3] Appendix C hereto, p. 7.

REASONS FOR GRANTING THE WRIT

More than 16 years ago, because Alabama's libel laws abridged freedom of speech and of the press, this Court cast aside this impermissible infringement and adopted a new "federal rule" of libel. *New York Times* v. *Sullivan,* 376 U.S. 254, 279-280:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether im was false or not.

Because Alabama has applied its so-called "scintilla rule" to defamation actions brought by public officials or public figures against newspapers in these circumstances; because the Alabama Supreme Court has refused to make a determination of who is a public official or a public figure as required by a concomitant uniform constitutional standard;[6] and because, in so doing, the court below has decided these critical federal questions in a way which conflicts with *New York Times* v. *Sullivan* and all of its progeny to date, it is imperative that this Court address and overturn the renewed rejection by the Supreme Court of Alabama of the constitutional guaranties enshrined in these decisions of this Court as essential to freedom of the press.

I.

The Application Of Alabama's Scintilla Rule In This Case Violates Freedom Of Speech.

This Court in *New York Times* v. *Sullivan,* 376 U.S. at 285-286, held that proof of malice under the federal rule of libel

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[6] *Rosenblatt* v. *Baer,* 383 U.S. 75, 84 *et seq.*

must be with "the convincing clarity which the constitutional standard demands. . ." Moreover, "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson,* 390 U.S. 727, 731.

The court below, however, has reversed a summary judgment for Bronner presumably on the theory that his statements could be construed by a jury to contain criminal charges against respondents, despite his undisputed affidavit that he expressly made plain at the very time and place of the statements that he was not making any charges at all, let alone criminal ones, against them. The opinion of the court below never explains how respondents can conceivably meet the burden proof by convincing clarity that Bronner in fact entertained serious doubts as to the truth of his statements. Such an absurdity can perhaps be explained—if at all—by the application of Alabama's "scintilla rule" to this defamation case. (Opinion Below, Ms. 12-14) As the court below recently explained in another libel case, *American Benefit Life Ins. Co.* v. *McIntyre,* 375 So.2d 239, 246 (Ala. 1979):

> We hold from the materials before it that the trial court at the very least should have gleaned a glimmer, spark or scintilla of evidence which would present a triable issue of fact over whether the statements were published with knowledge of their falsity or with reckless disregard of whether they were false or not.

And the court below there went on to hold that *New York Times* v. *Sullivan* does not "require the application of a clear and convincing evidence test on a motion for summary judgment when the plaintiff is a public figure." (375 So.2d at 249)

The pervasiveness of the Alabama scintilla rule does not end at summary judgment. Its gleam and glimmer provide "the standard by which the trial judge must determine the propriety

of granting a motion for directed verdict;"[7] and, if a jury returns a verdict for a plaintiff on such a scintilla of evidence, a judgment notwithstanding the verdict "should be denied if there is any conflict in the evidence for the jury to resolve and the existence of such conflict is to be determined by the scintilla rule."[8] Only a new trial may be granted in these circumstances; and, under a recently reenacted Alabama statute: "No more than two new trials can be granted the same party in any cause of action."[9]

There is no way that Alabama's scintilla rule—the underpinning of the judgment below which reversed a summary judgment for this newspaper—can meet the constitutional requirement of this Court that malice under the federal constitutional law of libel must be proven by convincing clarity. "Convincing clarity" and a "gleam or glimmer" of evidence are simply contradicitions in terms.

In *Brady* v. *Southern Ry. Co.,* 320 U.S. 476, this Court rejected North Carolina's scintilla of evidence rule in actions brought under the Federal Employers' Liability Act.[10] It held that a "uniform federal rule as to the necessary amount of evidence" was essential if litigants under the Act were to receive similar treatment throughout the country:

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[7] *Vintage Enterprises Inc.* v. *Cash,* 348 So.2d 476, 478 (Ala. 1977).

[8] *Hanson* v. *Couch,* 360 So.2d 942, 944 (Ala. 1978).

[9] §6-8-104, Alabama Code 1975. Apparently Alabama and South Carolina are the only states which have retained the scintilla rule. IX Wigmore on Evidence, § 2492.

[10] 45 U.S.C.A. §51 *et seq.*

> [W]hen a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. (Cit.) When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (320 U.S. at 479-80)[11]

A fortiori Alabama's scintilla rule must bow to the constitutional requirement which impelled the federal rule of libel enunciated in *New York Times* v. *Sullivan,* and the accompanying constitutional test for meeting the constitutional standard demanded by this constitutional rule.

The American Law Institute and the authors of the Restatement of the Law, Torts 2nd waited more than ten years after *New York Times* v. *Sullivan* to restate the law of defamation. Their reason was:[12]

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[11] The Alabama Supreme Court has bowed without difficulty to the elimination of its scintillanrule in suits under the federal act. *L. & N. R. Co.* v. *Grizzard,* 238 Ala. 49, 54-55, 189 So. 203; *L. & N. R. Co.* v. *Steel,* 257 Ala. 474, 478-479, 59 So.2d 664; *L. & N. R. Co.* v. *Green,* 255 Ala. 642, 646-647, 53 So.2d 358.

[12] Restatement of the Law, Torts 2nd, p. 152.

> The institute does not refrain from the process of restating an area of the law because of the circumstance that it is in the process of undergoing substantial change. Instead, it has sought to anticipate the further development of the decisions and to analyze the logical implications of the newly developed principle. In the situation here involved, however, there is a material difference. Here, *one court, the Supreme Court of the United States, has the final word, and its decision is binding on all of the state courts as a matter of constitutional law.* A section of the Restatement that does not accord with an existing or later decision of the Supreme Court is simply wrong, and no amount of authority from other courts can make it accurate. For this reason, the Institute has deferred as long a feasible the restatement of the chapters on defamation, in the hope that new decisions of the Supreme Court would settle uncertain issues. In the decade since the New York Times case, the Court was struggling to determine and set forth the evolving constitutional law on the subject. (Emphasis supplied.)

On the question of the weight of the evidence, the uniform law of the land is:[13]

> Not only does the plaintiff have the burden of raising the issue of knowledge or reckless disregard and of proving that the defendant's conduct was outside the scope of the constitutional protection, but *the proof must be 'with convincing clarity.' This requirement, also described as one of 'clear and convincing proof,' is held to be imposed by the Constitution.* (Emphasis supplied.)

The decision below conflicts with *Time, Inc.* v. *Pape,* 401 U.S. 279. There this Court determined that evidence of the omission of the word "alleged" from a magazine story based

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[13] Restatement of Torts 2nd, 580A(f), p. 220.

upon a government report was insufficient, as a matter of law, to support a finding of knowing or reckless falsity.[14]

The decision below conflicts as well with other decisions of this Court. *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 300, reversed a libel judgment based upon a false news story that a candidate for tax assessor had been charged in a federal court with perjury, when in fact the candidate's brother was the one who had been so charged:

> Since the [plaintiff] was permitted to recover without a finding that the newspaper either knew the article was false or published it in reckless disregard of its truth or falsity, the judgment must be reversed unless there is some basis for saying that the rule of New York Times does not apply to the particular libel in question.

In *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272—reversing on the same day another libel judgment against a newpaper—this Court reiterated "the stringent standard of knowing falsehood or reckless disregard of the truth . . ."

The decision below held, indeed, that Bronner's official duties included that of "informing the public of the results of statutorily prescribed investigations of state departments and agencies." (Ms. 10) Thus its ultimate irony is that had Bronner been an official of the United States or of most states, the remarks he made at his news conference would have been absolutely privileged under the principles of *Barr* v. *Mateo,* 360 U.S. 564, and the national trend of state decisions.[15]

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[14] This Court reversed a judgment of the Court of Appeals which had reversed the district court's grant of a directed verdict for the magazine. 401 U.S. at 283-284.

[15] *Restatement of the Law, Torts 2nd,* §591, p. 255:

> "a. Complete freedom in performing the duties of the important executive offices of the Nation and State requires the ab-

II.

A Judicial Failure To Determine Whether A Libel Plaintiff Is A Public Official Or Public Figure Under A Uniform Constitutional Test Violates Freedom Of Speech.

Although the court below held that a judicial determination of whether the plaintiffs were public officials or public figures is "mandatory", it declined to make this determination, and held

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solute privilege to publish defamatory matter of others when the publications are incidental to the performance of the duties of the office. The public welfare is so far dependent upon a reasonable latitude of discretion in the exercise of functions of high executive offices that their incumbents may not be hindered by the possibility of a civil action for defamation in connection therewith.

"b. In Barr v. Matteo (1959) 360 U.S. 564, it was held that the rule of absolute privilege stated in Clause (a) extends to all officers of the United States, no matter how inferior their position or duties, so long as the publication is made in the performance of the duties, or, as the Court put it, within the 'outer perimeter' of their duties. Accordingly, the rule stated in Clause (a) extends to all federal officers.

"c. All of the state courts that have considered the question have agreed that the absolute privilege stated in Clause (b) protects the superior officers of the state governments, including at least the governor, the attorney-general or the heads of state departments whose rank is the equivalent of cabinet rank in the Federal Government. A good number of the States have gone jurther, and have extended the absolute privilege to state officers of various ranks below that of cabinet level. The greater number of the state courts have not made the extension to the point of the federal rule and some have expressly confined the absolute privilege to superior officers of the States. This leaves the inferior state officers in these States with only a conditional privilege, as stated in §598A.

"d. The privilege stated in this Section is absolute. Hence no action for defamation can be maintained against any one of the designated executive officers irrespective of his purpose in making the publication."

instead "that the trial court erred in failing to make this initial determination." (Ms. 12) The court below has thus decided a federal question in a way in conflict with applicable decisions of this Court. The doctrine of *New York Times* v. *Sullivan,* 376 U.S. 254, applies because respondents Wyatt and Fulton were public officials; and, indeed, even if they were not, because they seek $3 million in punitive damages from Bronner. *Gertz* v. *Welch,* 418 U.S. 323, 350:

> In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

This Court held in *Rosenblatt* v. *Baer,* 383 U.S. 75, 84, that the question of whether a defamation plaintiff is a public official within the federal rule of *New York Times* v. *Sullivan* should not be answered by reference to state-law standards; that the constitutional protections afforded by *New York Times* may not vary from state to state; and that, accordingly, "public officials" must be defined in a uniform manner consistent with the constitutional protection of free speech and press guaranteed by the federal rule enunciated in *New York Times.* Surely such a critical constitutional determination may not be ignored by a state's highest court in a multimillion dollar defamation action. And this Court in *New York Times* v. *Sullivan,* 376 U.S. at 284-285, has made it plain that:

> [C]onsiderations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.

Indeed, this Court has held that the manager of a ski lodge,[16] the clerk of a state court,[17] a police commissioner,[18] a deputy sheriff,[19] and a deputy chief of detectives[20] are "public officials" within the holding of *New York Times.*

Wyatt, as deputy director of the State Building Commission and building inspector Fulton are public officials within the tests of the decisions of this Court. Many state and federal decisions accord.[21]

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[16] *Rosenblatt* v. *Baer,* 383 U.S. 75.

[17] *Beckley Newspapers* v. *Hanks,* 389 U.S. 81.

[18] *New York Times* v. *Sullivan,* 376 U.S. 254.

[19] *St. Amant* v. *Thompson,* 390 U.S. 727.

[20] *Time, Inc.* v. *Pape,* 401 U.S. 279, 284.

[21] In the following cases the following plaintiffs were held to be "public officials" within the New York Times rule: *Ross* v. *News Journal Co.,* 228 A.2d 531, (justice of the peace and his clerk); *MacNeil* v. *Columbia Broadcasting System, Inc.,* 66 FRD 22 (Marine Corps officer participating in national security seminar in his official capacity as spokesman for the Defense Department); *Ryan* v. *Dionne,* 28 Conn. Supp. 35, 248 A.2d 583 (city's delinquent tax collector); *Bishop* v. *Wometco Enterprises Inc.,* 235 So.2d 759 (investigator who was paid professional employee of city); *Tagawa* v. *Maui Publishing Co.,* 448 P.2d 337 (member of county board of supervisors); *Coursey* v. *Greater Niles Tp. Publishing Corp.,* 40 Ill.2d 257, 239 N.E.2d 837 (city patrolman); *Tunnell* v. *Edwardsville Intelligence, Inc.,* 99 Ill. App.2d 1, 241 N.E.2d 28 (city attorney); *Doctors Convalescent Center, Inc.* v. *East Shore Newspapers, Inc.,* 104 Ill. App.2d 271, 244 N.E.2d 373 (nursing home licensed by state department of health, but neither state-owned nor state-operated); *Bienvenue* v. *Angelle,* 254 La. 182, 223 So.2d 140 (parish director of public welfare); *Cherry* v. *Hall,* 270 So.2d 626 (parish treasurer elected by police jury of parish); *Standke* v. *B. E. Darby & Sons, Inc.,* 193 N.W.2d 139 (grand jurors); *Brown* v. *Kitterman,* 443 S.W.2d 146 (manager of community center); *Silbowitz* v. *Lepper,* 32 App. Div2d 520, 299 N.Y.S.2d 564 (supervisor and senior administrator of post office branch of New York City Post Office Department); *Chase* v. *Daily Record, Inc.,* 83 Wash.2d 37, 515 P.2d 154 (port district commissioner).

III.

Freedom Of Speech and Press Mandate Summary Judgment.

The judgment below mocks the First Amendment guarantees of free press and free speech and emasculates *New York Times* v. *Sullivan* and other landmark decisions of this Court. It demonstrates starkly why many courts have held that summary judgments in favor of newspapers are essential to safeguard freedom of speech and press from the chilling effect of spurious libel suits—those supportable, if at all, by flickers, gleams or scintillas of evidence.[22]

This case presents classic evil. Because Bronner did his duty and investigated reports of prior mismanagement and worse in an important state agency—and then acted on the basis of sworn testimony—he was immediately subjected to multimillion dollar slander suits by four agency employees who were discharged. One of the four—the former director of the agency—has pleaded guilty to a criminal charge arising out of payments from contractors, and has withdrawn his civil slander action. Another, discharged for using a state automobile to engage in political activities on state time while on the state

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[22] *Fadell* v. *Minneapolis Star & Tribune Co.*, 557 F.2d 107 (7th Cir. 1957), cert. denied 434 U.S. 966; *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Time, Inc.* v. *McLaney*, 406 F.2d 565 (5th Cir.), cert. denied, 395 U.S. 992; *Perry* v. *Columbia Broadcasting System, Inc.*, 499 F.2d 797 (7th Cir.), cert. denied, 419 U.S. 883; *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125; *Miller* v. *News Syndicate Co.*, 445 F.2d 356 (2d Cir. 1971); *Thompson* v. *Evening Star Newspaper Co.*, 129 U.S. App. D.C. 299, 394 F.2d 774, cert. denied, 393 U.S. 884; *Washington Post Co.* v. *Keogh*, 125 U.S. App. D.C. 32, 365 F.2d 965 (1966), cert. denied, 385 U.S. 1011; *Meerpol* v. *Nizer*, 381 F.Supp. 29, 32 (S.D.N.Y. 1974); *Guitar* v. *Westinghouse Electric Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975).

payroll, has not appealed from the summary dismissal of his case. But the court below has permitted respondent Wyatt—deputy director with significant supervisory duties over the agency during the period involved and the subject as well of sworn testimony of misconduct, and respondent Fulton—whose sub par performance as one of too many building inspectors has already been described, to continue this baseless litigation through indeterminate and costly state trial and appellate proceedings.

Summary judgments in favor of state cabinet officers who publish the results of such investigations into maladministration are constitutionally required in order to relieve against the financial burdens of expensive court proceedings, which, if unwarranted, would offend the constitution by "chilling" the exercise of free speech and press, and thus foreclosing this vital avenue of communication to the public.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1980

No. 79-217

David H. Fulton, et al.

v.

The Advertiser Company, et al.

Appeal from Montgomery Circuit Court

PER CURIAM.

This is an appeal from a summary judgment for defendants The Advertiser Company and David Bronner in a defamation suit seeking compensatory and punitive damages. We reverse and remand.

Defendant David Bronner, Finance Director of the State of Alabama and by virtue of that position a member of the State of Alabama Building Commission, acting within his official capacity as Chairman of the State Building Commission's Executive Committee on Personnel and Finance, initiated an investigation into alleged abuses and misconduct within the Commission. As a result of this investigation and the Committee's examination of the Commission, six Commission employees, including plaintiffs William Wyatt, the Deputy Director of Technical Staff, and David Fulton, a building inspector, were fired.

With regard to these dismissals, defendant Bronner held a press conference May 29, 1979, during which he issued a press release, made some additional statements, and answered ques-

tions from members of the assembled press, which included a representative of defendant Advertiser. The same day both plaintiffs were notified of their dismissal by letters from the Committee. On May 30, the Advertiser published an article in its morning edition concerning the investigation and the dismissals.

As a result of the press release, additional statements made at the press conference, and the subsequent newspaper article, Wyatt, Fulton and others not involved in this appeal filed separate complaints seeking compensatory and punitive damages for libel and slander against Bronner and the Advertiser. Bronner and the Advertiser moved to dismiss on a number of grounds. Certain of these grounds were denied and a hearing was set on the remaining grounds. Affidavits were filed by both sides and after arguments the trial court granted summary judgments for both defendants. That court held that Bronner's statements were qualifiedly privileged and that there was no evidence in the record indicating actual malice. Accordingly, the court found that the Advertiser's report of the press conference was fair and that Bronner's privilege also protected the newspaper. Wyatt and Fulton appeal.

The basic issue presented by this case is whether summary judgment was appropriate. Prior to any resolution of this issue, however, an examination of the alleged defamatory statements is necessary.

The press release issued by Bronner stated the following:

> A financial investigation authorized by Title 41 of the Code of Alabama has been conducted into the Alabama Building Commission.
>
> The investigation was conducted by the Examiners of Public Account, the Department of Public Safety and the Finance Office, which included taking sworn deposition from employees of the Building Commission, architects, contractors and testing firms from throughout Alabama.

As a result of this financial investigation, evidence of questionable activities and management was received relating to the following:

(1) The utilization of state employees on state time to do private business.

(2) The discovery of employees on the payroll who provided little or no service to the state.

(3) Allowing and/or initiating construction change orders resulting in contractors receiving greater profits.

(4) The utilization of gratuities and/or agents in order to secure state business.

Based on the information produced by the financial investigation and a thorough review of the qualifications and past performance of the present Building Commission personnel, the "Personnel and Finance Committee" of the Building Commission discharged six employees.

All results of the investigation will be turned over to the Attorney General to be utilized as he sees fit.

In his affidavit, Bronner stated the following concerning his comments at the press conference:

In response to a question, I gave the names of the six employees referenced in the statement - names which included plaintiffs Wyatt and Fulton... .

At no time did I state that any charges had been or would be lodged against them. In fact, when asked by a reporter what charges had been made against any specific individuals, I answered, "What charges? I have made no charges about anyone. As far as the Committee is concerned, they were dismissed because of qualifications and performance."

The article published by the Advertiser in response to the press conference reads, in pertinent part, as follows:

> The director, deputy director and four other employees of the State Building Commission were fired Tuesday in the wake of an investigation into mishandling of building contracts and state work on private property.
>
> Finance Director David Bronner said Building Commission Director Hugh Adams, Deputy Director William Wyatt, Energy Division chief John Cluck and three building inspectors were fired by the commission's executive committee after the investigation uncovered widespread abuses in the department.
>
> Bronner directed the six-week investigation by members of the Examiners of Public Accounts, the Department of Public Safety, and the Finance Department.
>
> The results were turned over to Attorney General Charlie Graddick for further investigation.
>
> W.G. Stevenson, a professional engineer and veteran employee of the commission, was appointed temporary director of the department. Other vacancies will be filled later, but Bronner said some of the vacancies will probably remain unfilled.
>
> The finance director said one of the fired building inspectors had not turned in an inspection report in seven years.
>
> The dismissed inspectors were identified as David Fulton, Ray Martin and Howard Wilson.
>
> Bronner said the investigation uncovered evidence of questionable activities and management in four areas:
>
> —The use of state employees on state time to do private business.

—The discovery of employees on the payroll who provided little or no service to the state.

—Allowing or initiating construction change orders resulting in contractors receiving greater profits.

—The use of gratuities and agents in order to secure state business.

Contractors and architects wanting to do business with the state were told they would have to get an agent with political influence before they could get a state contract, Bronner said. The contractor or architect negotiated with the agent to use his influence, the finance director added.

But the contractors and architects who used agents in the past would not be barred from doing business with the state, he said.

"This is more a problem of the state than of the architects and contractors," he said. "They had to go through the system, and the system was bad."

Bronner said in reply to questions that none of the private work involved the new home of former Gov. George Wallace or property of his relatives.

The finance director declined to answer when asked if the private work involved property belonging to any of the dismissed employees.

Change orders were freely given with the result that contractors could bid low on a project and then add unbid modifications to increase the price to a more profitable level, he said.

The investigators examined commission activities over a five- or six-year period during which contracts involving millions of dollars in school and other building construction were issued.

> ... Wyatt was appointed to the commission staff as deputy director in 1971.
>
> ... Bronner said the dismissed employees were not given a chance to resign because they knew for at least two weeks they were being investigated and had not resigned.

This article was accompanied by a headline in bold type which stated: "Officials Fired Following Probe."

The letters of dismissal to both plaintiffs simply informed them that the Committee had met "to review qualifications and performance of Commission employees" and that their (plaintiffs') employment had been thereby terminated.

In an action for defamation, an initial determination of the status of the allegedly defamed person as a public official, public figure, or a private individual *must* be made. *E.g., American Benefit Life Ins. Co.* v. *McIntyre,* 375 So. 2d 239 (Ala. 1979). This is a question of law for the trial judge. *Rosenblatt* v. *Baer,* 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed. 2d 597 (1966), *Mobile Press Register, Inc.* v. *Faulkner,* 372 So. 2d 1282 (Ala. 1979).

In *Mobile Press Register, Inc., supra,* this Court stated:

> This issue [status] must be resolved first because the manner of its resolution determines what elements of proof are necessary for recovery. *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964), and its progeny mandate that no public figure may recover compensatory or punitive damages for libel unless actual malice as defined in *Sullivan* is proved: a publication made with actual knowledge of its falsity or made with reckless disregard of its truth or falsity. If plaintiff be a private figure, he or she need not prove *Sullivan* malice unless punitive damages are claimed. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974). (footnotes omitted)

As Justice Almon noted in the recent decision of *Gray* v. *WALA-TV,* 384 So. 2d 1062 (Ala. 1980): "This actual malice standard was further elaborated on in *St. Amant* v. *Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968); there it was stated that reckless disregard requires "...sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication."

Privilege is another issue which bears directly upon the issue of proof of malice.

Bronner contends that the court below was correct in finding that he was conditionally privileged to make public the results of his department's investigiation. The test in this jurisdiction for determining whether a conditional privilege exists is as follows:

> Where a party makes a communication, and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged, if made in good faith and without actual malice. ***The duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is social or moral in its nature and defendant in good faith believes he is acting in pursuance thereof, although in fact he is mistaken.

Willis v. *Demopolis Nursing Home, Inc.,* 336 So. 2d 1117 (Ala. 1976), quoting *Berry* v. *City of New York Ins. Co.,* 210 Ala. 369, 98 So. 290 (1923).

> The question of whether a communication is privileged by reason of its character or the occasion on which it was made is a question of law for the judge.

Willis, supra.

Although the duties of the State Finance Director as set out in Title 41, Code 1975, do not specifically include informing the public of the results of statutorily prescribed investigations of state departments and agencies, we conclude that this activity comes within the penumbra of his official duties. The public has a general interest in the results of investigations disclosing governmental abuse or mismanagement. We, therefore, agree with the trial judge's determination that Bronner was cloaked with a conditional privilege.

This Court has further stated that "[w]here a communication is conditionally privileged, it is free from the legal imputation of malice and is actionable only if there is actual malice." *Willis* v. *Demopolis Nursing Home, Inc., supra.*

It is unclear from the record as to how the trial judge viewed the status of Wyatt and Fulton. As *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), and its progeny have mandated, the threshold question in a defamation case is the determination of the status of the allegedly defamed person as a public official, public figure or a private individual. This issue must be resolved before the court can determine what elements of proof of malice are required. The trial judge did not address the issue of status, and instead, decided the case on the basis of Bronner's and the Advertiser's qualified privilege. Our cases have held that once a qualified privilege has been found to exist, the plaintiff must allege and prove actual or express malice in order to recover. *Browning* v. *Birmingham News,* 348 So. 2d 455 (Ala. 1977); *Willis* v. *Demopolis Nursing Home, supra; O'Barr* v. *Feist,* 292 Ala. 440, 296 So. 2d 152 (1974).

Since *Sullivan* and its progeny have redefined actual malice in defamation cases brought by public officials or public figures, the reference to actual malice without further distinction has caused a considerable amount of confusion and ambiguity in interpretation and application of the two different standards of malice. In this jurisdiction actual or express malice in its tradi-

tional sense "may be shown by evidence of previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like ... or by the violence of the defendant's language, the mode and extent of publication, and the like." *Kenney* v. *Gurley,* 208 Ala. 623, 95 So. 34 (1934).

Prior to *Sullivan,* the preceding standard of actual malice was the only standard. *Sullivan,* however, redefined an old term to require a new and more stringent standard of proof in compliance with constitutional standards. "Actual malice" in its constitutional sense, therefore, means "with knowledge that it [the publication] was false or with reckless disregard of whether it was false or not." *Sullivan.*

It is apparent from the record that the trial judge fell prey to the confusion created by the interchangeable use of the single term "actual malice" to convey two separate concepts. The trial judge stopped short of a crucial determination in failing to reach the issue of the plaintiffs' status, and held that "actual malice" in conjunction with the privilege defense need only be shown in the traditional sense. *Willis* v. *Demopolis Nursing Home, O'Barr* v. *Feist, Kenney* v. *Gurley.* This would have been correct prior to *Sullivan* and its progeny, whether the plaintiffs were public or private persons, and still continues to be correct as to private individual plaintiffs.

Subsequent to *Sullivan,* however, it is mandatory that the plaintiff's status be determined initially, in order to next determine whether traditional malice or *Sullivan* malice must be shown. We hold, therefore, that the trial court erred in failing to make this initial determination.

Finally, we reach the basic issue presented by this appeal—whether summary judgment was appropriate under the particular circumstances of this case. The law in this jurisdiction, as set out below, is well settled as to the basic principles which govern in a review of a grant or denial of summary judgment.

> The party moving for summary judgment must clearly show, i.e., has the burden to show, that the other party could not recover "under any discernible circumstances." *Folmar* v. *Montgomery Fair Company, Inc.*, 293 Ala. 686, 309 So. 2d 818 (1975); see also, *Ray* v. *Midfield Park, Inc.*, 293 Ala. 609, 308 So. 2d 686 (1975).
>
> A motion for summary judgment may be granted only when there is no genuine issue as to a material fact and the movant is entitled to judgment as a matter of law. *Birmingham Television Corporation* v. *Water Works,* 292 Ala. 147, 290 So. 2d 636 (1974).
>
> The moving party has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." *Adickes* v. *Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970).
>
> Likewise, we consider the "Scintilla Rule" in connection with summary judgment. We held in *Folmar* v. *Montgomery Fair Company, Inc., supra,* that if there is a scintilla of evidence produced in plaintiff's favor on the issue of defendant's negligence, then summary judgment will not lie. As the majority of this Court pointed out therein, the plaintiff might escape having summary judgment rendered against him, yet still suffer the ignomy of defeat by way of directed verdict.

Loveless v. *Graddick,* 295 Ala. 142, 325 So. 2d 137 (1975).

In *Loveless,* we also adopted with approval the following statement by the U. S. District Court in *Goldwater* v. *Ginzburg,* 261 F. Supp. 784 (1966), aff'd 414 F.2d 324 (2nd Cir.), cert. denied, 396 U. S. 1049, 90 S.Ct. 701, 24 L.Ed. 2d 695:

> The issue of actual malice on the part of defendants seems peculiarly inappropriate for disposition by summary judg-

ment because it concerns "motive, intent, and subjective feelings and reactions."

Bronner and the Advertiser, as the moving parties, had the burden of proving the absence of a genuine issue as to any material fact. We find that they failed to meet this burden.

In the press release (set out previously) Bronner listed four categories of "questionable activities and management" which were discovered as a result of the investigation. According to Bronner's own affidavit, however, of these four categories only number two, the discovery of employees on the payroll who provided little or no service to the state, applied to Fulton, and only number four, the utilization of gratuities and/or agents in order to secure state business, directly applied to Wyatt. Bronner further stated, however, that because of Wyatt's supervisory position, "the responsibility of misconduct, inefficiency and mismanagement attributable to employees under his supervision which continued uncorrected by Wyatt, must be charged to him." In his affidavit, Bronner stated that: in response to a press question he gave the names of the six Commission employees who were fired; at no time did he make any charges about anyone—to the contrary when asked what charges had been made he responded "What charges? I have made no charges . . . ."; and as far as the committee was concerned the dismissals were based on qualifications and performance.

In their affidavits, both Wyatt and Fulton denied that they were guilty of any wrongdoing and stated that they were unaware of any allegations or charges against them until they read the newspaper article the morning following their discharge. Both of their letters of dismissal merely stated that their employment had been terminated based on qualifications and performance. Also Wyatt stated: "I have personally discussed my job performance with the defendant Bronner prior to my dismissal. At no time did the defendant Bronner make any accusation to me or state in any fashion that I had done

anything wrong or that I was not performing my job responsibilities in a satisfactory manner. In fact, his statements to me were to the contrary."

Both contend that the article charged them with criminal activity and that the average lay reader would have interpreted the article to mean that each of the named dismissed employees was guilty of all four categories of questionable activities. In *McGraw* v. *Thomason,* 265 Ala. 635, 93 So. 2d 741 (1957), we held:

> In determining their actionable character, the printed words are to be taken in their natural meaning, and according to the sense in which they appear to have been used and the idea they are adapted to convey to those who read them. A forced construction is not to be put upon them in order to relieve the defendant from liability, nor are they to be subjected to the critical analysis of a trained legal mind, but they must be construed and determined by the natural and probable effect on the mind of the average lay reader.

In light of the preceding authority we find that the article and accompanying headline presented a genuine issue as to a material fact as to whether these words imputed criminal activity and guilt of all four categories of misconduct to both Wyatt and Fulton. *Loveless* v. *Graddick.*

Furthermore, they (Wyatt and Fulton) contend that the statements were false and the Bronner knew they were false when he made them. Because of the preceding contradictions in the affidavits of the parties, we find that there is a genuine issue as to a material fact presented here. For these reasons summary judgment was inappropriate for defendant Bronner.

As to defendant Advertiser, we find as did the trial judge, that the Advertiser was protected by Bronner's conditional privilege to the extent that it reported fairly and accurately the

information released at the press conference. We find, however, that from the record before us a genuine issue as to a material fact existed, making the grant of summary judgment for defendant Advertiser also inappropriate. In *American Benefit Life Ins. Co.* v. *McIntyre, supra,* we held that a news reporter's focusing upon particular portions of a financial report (concerning plaintiff insurance company's financial status) to the exclusion of other relevant portions of the same report could present a genuine issue of a material fact which should be resolved trial. We find similar factual assertions in the record here. Bronner states in his affidavit that he made it clearly known that the employees were discharged because of qualifications and performance; however, the words "qualifications and performance" did not appear anywhere within the article, nor was there any allusion to this reason for dismissal. Moreover, we do not find in the record any evidence whereby it can be determined that the Advertiser made any independent investigation as to the truth or falsity of Bronner's statements.

REVERSED AND REMANDED.

Torbert, C.J., Maddox, Faulkner, Almon and Shores, JJ., concur.

Embry, J., concurs in the result.

Opinion handed down September 19, 1980

APPENDIX B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV-79-731-G

David H. Fulton,
Plaintiff,
v.
The Advertiser Company,
et. al.,
Defendants.

Civil Action No. CV-79-729-G

William B. Wyatt,
Plaintiff,
v.
The Advertiser Company,
et al.,
Defendants.

Civil Action No. CV-79-786-G

Raiford J. Martin,
Plaintiff,
v.
David G. Bronner,
Defendant.

ORDER

This case is now submitted to the Court on the Defendant's motion for summary judgment with affidavits attached,[1] Plaintiff Martin's response to motion for summary judgment, the Plaintiff's objections and motion to strike the affidavits filed by Defendants, the counter-affidavits of Plaintiffs Wyatt and Fulton, together with the argument of counsel and the memoranda of law submitted by the parties.

I.

Plaintiff's Motion To Strike
Defendant's Affidavits And Materials

Plaintiffs have filed motions to strike the affidavits filed by Defendants in support of their motion for summary judgment assigning as grounds that the affidavits and other materials contain hearsay, opinions, and conclusions of the affiants.

Rule 56(e) ARCP provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

The requirements of Rule 56(e) are mandatory. Wright & Miller, Federal Practice and Procedure: Civil § 2738. A motion to strike is appropriate; however, the Court will disregard only

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[1] A Rule 12(b)(6) ARCP motion to dismiss is converted into a motion for summary judgment under Rule 56 when the Court considers matters outside of the pleadings, whether or not a motion is so denominated. Papastefan v. B & L Const. Co., 356 So.2d 158 (Ala. 1978).

the inadmissible portions of a challenged affidavit and will consider the rest of it. Wright & Miller, *supra.* In addition, affidavits in support of a motion for summary judgment may set forth only such facts as would be admissible in evidence. *Hunter* v. *Austin Co.,* 336 So.2d 203 (Ala.App. 1976) cert. denied, 336 So.2d 208 (Ala. 1976). Likewise, those filed in opposition must adhere to the same rule of admissibility. See *Shapiro* v. *Health Ins. Plan of Greater N.Y.,* 7 N.Y.2d 56, 194 N.Y.S.2d 509, 512 (N.Y. 1959).

A.

Copies Of Pleadings Filed In Federal Actions

The Court denies the Plaintiff's motion to strike copies of all documents filed in case numbers: Civil Action No. 79-265-N, Civil Action No. 79-264-N, Civil Action No. 79-272-N, Civil Action No. 79-305-N, and Civil Action No. 79-313-N, all being actions filed in the United States District Court for the Middle District of Alabama.

B.

Affidavits Of Frazier, Raiford, And Jordan

Affidavits of these individuals were not filed in support of Defendants' motion for summary judgment and therefore, these grounds of Defendants' motion to strike are not well taken.

C.

Affidavit Of James E. Foy

If the Defendants filed their affidavit of Dr. Foy for the purpose of establishing the truth of the statements made by Mr. Wright to Dr. Foy, the Plaintiffs are correct that those portions of the affidavit should be stricken as hearsay; however, the Court accepts the affidavit only for the limited purpose of a

showing that certain statements were made to Dr. Foy and that Dr. Foy transmitted this information to Defendant Bronner.

D.

Affidavit Of David G. Bronner

The Plaintiff Martin's motion to strike the affidavit of Bronner is granted as to the following paragraphs: 10, 14, 16, 17, 22, 23, 24, 25, 26, 27, 30, 32, 36 and the supplemental affidavit of David G. Bronner.

The motion to strike of Plaintiff Martin is partially granted as to the following: the first sentence of paragraph 11, the first sentence of paragraph 31, and the first sentence of paragraph 37.

The motions to strike filed by Plaintiffs Fulton and Wyatt are granted in the same respects as the motion to strike filed by Martin; however, inasmuch as the motion filed by Plaintiffs Fulton and Wyatt do not specifically object to portions of the Bronner affidavit, any other matters which these Plaintiffs specifically sought to strike is due to be, and the same is, hereby denied.

II.

Merits

Defendants assert several defenses in their motion. The Court will only address the defense of Bronner's qualified privilege inasmuch as the Court finds that it is determinative of this case.

In *Browning* v. *Birmingham News,* 348 So.2d 455, 458 (Ala. 1977), the Court discussed the doctrine of qualified privilege as it exists in this jurisdiction, as follows:

> " ' Where a party makes a communication and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which

> the party has an interest, and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice. * * * The duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is social and moral in its nature and defendant in good faith believes he is acting in pursuance thereof, although in fact he is mistaken.' "

At this juncture, it is important to note that the phrase "actual malice" when used in conjunction with the privilege defense is not to be confused with the term "Sullivan malice."[2] Actual malice as used in conjunction with the privilege defense "may be shown by evidence of previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like." *Kenney* v. *Gurley,* 208 Ala. 623 626 (Ala. 1923).

Further, our Supreme Court in *Willis* v. *Demopolis Nursing Home, Inc.,* 336 So.2d 1117 at 1120, said as follows:

> "The question of whether a communication is privileged by reason of its character or the occasion on which it was made is a question of law for the judge. *O'Barr* v. *Feist,* 292 Ala. 440, 296 So.2d 152 (1974). Where a communication is conditionally privileged, it is free from the legal imputation of malice and is actionable only if there is actual malice. *Id.* The burden is on plaintiff to prove actual malice. *Interstate Electric Co.* v. *Daniel, supra.*"

This Court recognizes that summary judgment is often inappropriate in a libel action; however, the Court in *Loveless* v. *Graddick,* 295 Ala. 142 (1975), indicated that in a case involving qualified privilege, summary judgment may well be appropriate

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[2] Mobile Press Register, Inc. v. Faulkner, 13 A.B.R. 1212, 1215 (Ala. April 6, 1979).

where no malice is shown. The Court also indicated in *Loveless* that in granting a summary judgment motion, it must be clear that no malice exists.

With the foregoing principles in mind, this Court need currently decide first whether the communications involved here were conditionally privileged and, second, whether the Plaintiffs have shown any evidence of actual malice sufficient to destroy the qualified privilege.

David G. Bronner was appointed to the position of Finance Director of the State of Alabama on March 14, 1979, by Governor Fob James. By virtue of being Finance Director he became a member of the State of Alabama Building Commission. Also by virtue of being Finance Director, he became Chairman of the Committee established by the Commission in 1967 to act on behalf of the Commission with respect to matters of personnel and financial administration of the technical staff of the Building Commission.[3]

Because he had had complaints concerning mismanagement within the Building Commission, Bronner began an investigation soon after he assumed the role of Finance Director. During the investigation, Bronner examined under oath persons both inside and outside of the Commission and also conducted conferences with several of these people. The investigations revealed incidences of what Dr. Bronner considered highly questionable employee conduct, under-qualified staff members, and incompetent work performance. On May 29, 1979, Bronner held a news conference at the State Capitol for the purpose of announcing the dismissals of the four Plaintiffs in this case. The next day, May 30, 1979, the *Montgomery Advertiser* published an account of the dismissals, giving the four specific justifications that Bronner cites in his affidavit:

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[3] Defendant Bronner was Finance Director on the dates in question. State of Alabama Ex Rel. Meadows v. Bronner, Civil Action No. CV-79-397-P. (Cir.Ct. Mont. Cty., September 28, 1979).

1. The use of state employees on state time to do private business.

2. The discovery of employees on the payroll who provided little or no service to the state.

3. Allowing or initiating construction change orders resulting in contractors receiving greater profits.

4. The use of gratuities and agents in order to secure state business.

Plaintiff Martin,[4] in the complaint for slander, alleges that he has been injured with respect to his reputation and standing in the community. Plaintiffs Wyatt and Fulton allege both libel against the newspaper as well as slander against David Bronner as Finance Director.

After separating the objectionable from the non-objectionable in the Bronner affidavit and in reviewing the communications as alleged in the pleadings, this Court finds that the communications were privileged.[5] Having so found, the Court further finds that the Plaintiff's affidavits in opposition do not show any malice on behalf of Defendant whatsoever. The fact that the communications of the Defendant may be untrue does

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[4] Plaintiff Adams was indicted on August 10, 1979, in a fourteen count indictment, each and every count thereof charging Plaintiff with perjury in connection with his testimony before a previous grand jury. State v. Adams, Case No. CC-79-781-P. (Cir.Ct.Mont.Cty.). On October 23, 1979, Adams pled guilty to Count XIV. On October 25, 1979, Plaintiff moved to dismiss his claim in Civil Action No. CV-79-746-G, and the claim was dismissed with prejudice.

[5] Colpoys v. Gates, 118 F.2d 16 (Ct.App.D.C.Cir.) is distinguishable from the case at Bar. The Colpoys court specifically held that defendant, a U.S. Marshall, was not under any duty to tell the public anything about the dismissal of his deputies or publicly to explain the reasons for their discharge. In the instant case, the Court finds that Bronner was acting in his general line of duty when he made comments to the assembled press.

not destroy the qualified privilege. *Vigoda* v. *Barton,* 348 Mass. 478, 204 N.E.2d 441, 26 A.L.R.3d 482 (1965). The New York Court of Appeals has also spoken to the question of qualified privilege: "Falsity is not sufficient for an inference of malice. It must be . . . consistent only with a desire to injure the plaintiff to justify . . . sending the question of malice to the jury." *Shapiro, supra* at 513.

The doctrine of qualified privilege is necessary in order for public officials to be able to do their jobs without fear of a libel suit being filed against them. "They [public officials] are entitled to be free, and beyond that the public interest requires that they be free, to engage in action which may have its genesis in honest error." *Vigoda, supra.*

As to the *Advertiser's* publication of the article concerning the Bronner press conference, the Court finds that the newspaper's account of the conference was fair. The conditional privilege with which Bronner was cloaked here protects the newspaper as well; the paper was merely printing the news as it found it.

It is therefore ORDERED that the Defendants' motions for summary judgment are due to be, and the same are, hereby GRANTED. It is further ORDERED that judgment be for the Defendants and costs are taxed against the Plaintiffs for which let execution issue.

DONE and ORDERED this the 30th day of October, 1979.

/s/ WILLIAM R. GORDON,
Circuit Judge

APPENDIX C

RELEVANT PORTIONS OF BRONNER'S AFFIDAVIT EXCLUDING THOSE STRICKEN BELOW

"WILLIAM B. WYATT"

"6. William B. Wyatt became Deputy Director of the Commission on May 1, 1973. Although the applicable statute (Section 41-9-141, Alabama Code of 1975) mandates the appointment of 'competent architectural and technical employees . . . necessary to effectuate the requirements of this article . . .' and although Wyatt's duties in the second ranking position on the Commission staff required exceptional architectural and technical competence, Wyatt was neither an architect nor an engineer. In addition, in view of his position and his supervision of employees of the technical staff and other employees of the Commission, the responsibility for misconduct, inefficiency and mismanagement attributable to employees under his supervision which continued uncorrected by Wyatt, must be charged to him.[1]

"I.

"Employees on State Payroll Who
"Provided Little or No Service to the State

"7. Footnote 1 has already mentioned the inspector, Howard Wilson, who turned in few if any reports for three years. (His annual salary was $14,846.00, which reflected a raise of $1,014.00 on July 13, 1978.)

"8. Another employee, Mac Saxon, was on the payroll from May 4, 1977 to January 10, 1978; he performed no more than a week's work during this period. (His annual salary at the latter date was $6,266.00)

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[1] For example, one building inspector, Howard Wilson, turned in few if any inspection reports for a period of three years. He was not discharged until I came to office and presented this circumstance to the Committee.

"9. Employee, John Cluck, salaried at $28,000.00 per year, engaged in the business of selling and exchanging gold certificates from his state office on state time with such a degree of notoriety that his activities became the subject of investigation by the Alabama Securities Commission. As recently as May 4, 1979, Edwin Hudspeth, Staff Director of the Alabama Energy Management Board, criticized Cluck's performance as exhibiting a 'lack of cooperation and unprofessional attitude.' Moreover, one Donald E. Little, who was hired on September 6, 1978 to work directly under Cluck as an energy inspector testified during my investigations that he had never performed any inspections. Cluck was employed in this capacity until discharged by the Committee.[2]

* * *

"12. As demonstrated more fully below (p. 10) Fulton's reports were confusing and often not properly routed. For example, his inspection reports for Guin Elementary School on March 5, 1979 reported that block masons were laying foundation walls, whereas his report of March 26, 1979 stated that 'block masons will start laying block March 27, 1979.' Fulton's annual salary at the time of his discharge was $17,420.00.

"13. Another building inspector, Ray Martin, was permitted to use a state automobile to engage in political activities on state time while on the state payroll. He was not discharged until I came to office and presented this circumstance to the Committee. His annual salary at that time was $16,094.00 (reflecting a raise of $2,262.00 on July 13, 1978).

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[2] Although perhaps irrelevant to Cluck's performance, Little also testified that he saw a case of Honeywell thermostats in Hugh Adams' office.

II.

Allowing or Initiating Construction Change Orders or Otherwise Structuring Specifications Which Resulted in Contractors and Suppliers Receiving Greater Profits and the Channeling of Business on an Impermissible Basis

* * * *

"15. An unusual change order in connection with the construction of the Diagnostic Laboratory at Auburn University was permitted. The original architect on the project, Carl H. Lancaster, Jr., has refused to approve the change order on the ground that the specified saving to the State of Alabama was to be only $25,000, when in fact it should have been approximately $100,00 to $130,000. Lancaster's sworn testimony was that when the revisions were proposed, he asked three other contractors who were original bidders on the job to estimate the probable savings which would result from these changes, and the estimates ranged from $100,000 to $130,000.

* * * *

"18. Specifications for carpeting in state buildings were designed to benefit a supplier, McAdams Carpets, Inc. As architect Charles Humphries testified: 'You speck (sic) everybody out.'

"19. Replacement of office machinery furnished by one supplier with identical office equipment by another supplier. Wyatt's explanation to the original supplier was that the replacement became necessary because of 'political obligations.'[3]

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[3] Alva Stuckey, Jr., President of Royal Office Equipment Company testified:

> "He [Wyatt] informed me that he had political obligations. Uh, through a company called Montgomery Office Equipment and when he was one of Governor Wallace's uh, what would

III.

Utilization of Gratuities or Agents in Order to Secure State Business

"20. Architect Carl H. Lancaster, Jr., gave sworn testimony that he had paid kickbacks to Hugh Adams, the then Director of Technical Staff.

"21. Architect, Martin K. Johnson, gave sworn testimony that he paid one Oscar Harper a 'promotional fee,' consisting of a percentage of his total architectural fee, in order to secure state business as a favored architect. The total amount of such fees paid by Johnson to Harper was over $20,000.

* * * *

"28. Failure to report damage to state automobile used by Wyatt.

"29. Activities of John Cluck described in paragraph 9 above.

V.

Additional Evidence of General Mismanagement

* * * *

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you called them, cronies, and that he could not get the equipment from me but that he had an obligation with the other company. I tried to impress upon him that we had done business with the Building Commission. Miss Foster and the other people in the Building Commission were very pleased with their service and their backup and Miss Foster had indicated to me, when I asked her what was going on, she implied to me with, you know how you will when you have worked with someone as long, she was not at all pleased with having to do business with Montgomery Office Equipment Company because she had some unfavorable trying to call them when they needed repairs of things like this and they did not respond and did not come."

"31. * * * The activities of John Cluck have already been described. In order to safeguard his employment, it was necessary to replace an energy grant with equivalent state funds to be allocated to the Commission. Adams and Wyatt attempted to amend the Governor's general fund budget request for this purpose, despite the Governor's instructions that such amendments were to be cleared through him and despite the record of misconduct of John Cluck. (The evaluation by Hudspeth of Cluck has been noted above in paragraph 9.)

* * * *

"33. Moreover, the merit system employee who handles personnel matters for the Commission, . . . , testified:

> "At the present time the working conditions are almost unbearable as far as our administrative procedures and our leadership. We are not certain as to exactly what to do when and by that I mean we have had division chiefs who have been responsible to a point of uh a certain phase of office procedures and now it appears that those people really don't know what is going on and by that I mean they were department heads and they had control of their department at the present time there is no control of anything, uh its very haphazard as far as I'm concerned and who you answer to and this type of thing."

NACE ALLEN

"34. Adams and Wyatt themselves recommended that Allen be discharged. At a meeting of the Committee, Adams stated that 'there had been general criticism of the level of inspectors over the years and that he and Wyatt felt that these two inspectors [Nace Allen and J. V. Ashhurst] were among the worst.' Additional findings corroborate their evaluation of Allen, including information that the absence of inspection activities by Allen was something of a joke.

DAVID H. FULTON

"35. On the basis of the Adams and Wyatt evaluation of the building inspectors, and the more precise and meaningful criticism from such knowledgeable persons as Herbert and Stevenson, the Committee determined that the number of building inspectors could and should be reduced, and that those less qualified and most recently employed should be laid off first.

* * * *

"37. * * * Herbert, chief of the division of supervision, whose duty was to oversee inspection, testified under oath: "I don't know how he was hired'; and 'I don't know what kind of a professional he is.'

"38. W. G. Stevenson, Chief Engineer and now Director of Technical Staff of Commission, reported to me regarding Fulton:

> " 'All inspection reports were supposed to be routed through me but for at least six months prior to May 29, 1979 I'm not sure that I saw all of Fulton's reports. As for the reports that I saw there was nothing to indicate an unusual ability or awareness as a building inspector, in fact, there were some confusing reports.' (See letters of April 17 and May 14 attached to this affidavit as Exhibits 'A' and 'B'.)

"CIRCUMSTANCES OF DISCHARGE OF PLAINTIFFS

"39. The minutes of the meeting of May 29, 1979, signed by Dr. Teague, Representative Sasser, and me show the following:

> "A discussion took place concerning the number of building inspectors needed by the Commission. Members of the staff had advised the Committee, through the Chairman, that only three or four inspectors were necessary. It was their recommendation that Mr. Rutherford and Mr.

McCollough were the best inspectors, and that Mr. Kirk, III was developing suitably. Dr. Bronner made the motion to allow Mr. Stevenson to closely monitor Mr. Kirk's performance and to retain or dismiss him as he saw fit; and on the basis of qualifications and performance to dismiss the inspectors, Mr. Ray Martin, Mr. David Fulton and Mr. Howard Wilson. The motion was unanimously adopted.

"Further discussion of the personnel needs of the Commission followed with emphasis on the necessity of acquiring managers with better academic credentials and professional experience. After the qualifications and performance of the present management team were reviewed, Dr. Bronner moved that Mr. Hugh Adams and Mr. William B. Wyatt be dismissed. The motion was adopted unanimously."

"40. On that same day I issued a written statement to the news media entitled 'Press Conference' a copy of which is attached to this affidavit as Exhibit 'C'.

"41. In response to a question, I gave the names of the six employees referenced in the statement — names which included plaintiffs Wyatt and Fulton, but not Allen. The Committee had voted to dismiss Allen on April 19, 1979.

"42. At no time did I state that any charges had been or would be lodged against them. In fact, when asked by a reporter what charges had been made against any specific individuals, I answered, 'What charges? I have made no charges about anyone. As far as the Committee is concerned, they were dismissed because of qualifications and performance."

No. 80-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID G. BRONNER,
Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

On Petition for a Writ of Certiorari
To The Supreme Court of Alabama

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This reply brief is addressed to the argument in respondents' brief in opposition that as of the date on which the trial court entered summary judgment[1] for petitioner—October 30, 1979—respondents had not had "the benefit of" or "opportunity to pursue" discovery of petitioner.[2]

This argument of respondents is factually incorrect and considerably misleading. Moreover, the issue of the adequacy of discovery prior to summary judgment formed no part or basis of the decision of the Alabama Supreme Court which petitioner seeks to review here. Indeed, that court never mentioned the matter.

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[1] Appendix to Petition, A-14-21.

[2] Respondents make this argument in their Questions Presented and at nine additional places in their brief. (pp. 2, 5, 15, 16, and 19).

The accurate facts are contained in the order of the trial court of December 6, 1979, which denied reconsideration of its summary judgment. That court there specifically addressed the issue of discovery, and noted that during the almost three month period from August 7, 1979 to the date of summary judgment on October 30, 1979, "[Respondents] made no further attempts to depose [Petitioner]".[3]

Accordingly, the issue of the adequacy of discovery prior to summary judgment is a spurious one based upon a factually erroneous premise. For the reasons specified in the petition for Writ of Certiorari, it is respectfully reiterated that this petition should be granted.

Respectfully submitted,

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[3] The entire text of the trial court's order of December 6, 1979, is appended to this reply brief.

APPENDIX

APPENDIX

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

David H. Fulton,
Plaintiff,

vs.

The Advertiser Company,
et al.,
Defendants.

Civil Action No.
CV-79-731-G

William B. Wyatt,
Plaintiff,

vs.

The Advertiser Company,
et al.,
Defendants.

Civil Action No.
CV-79-729-G

Raiford J. Martin,
Plaintiff,

vs.

David G. Bronner,
Defendant.

Civil Action No.
CV-79-786-G

ORDER

This matter came on to be heard on Plaintiffs Fulton, Martin and Wyatt's motions for reconsideration. Counsel for Plaintiffs

Fulton and Wyatt, and counsel for Defendants appeared. Counsel for Plaintiff Martin did not appear.

The Court having read and considered Plaintiffs' motion for reconsideration, the Court finds that the motion is due to be and it is ORDERED that the same is hereby DENIED.[1]

DONE and ORDERED this the 6th day of December, 1979.

/s/ WILLIAM R. GORDON
Circuit Judge

cc: M. R. Nachman, Esq.
Frank M. Wilson, Esq.
Allen Howell, Esq.

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[1] On July 27, 1979, the Defendants filed their motion for protective order and for stay of discovery on behalf of Defendants Bronner and The Advertiser Company alleging that depositions had been set and interrogatories filed, but that discovery should be stayed pending decision by the Court regarding a serious question of jurisdiction of this Court to proceed because of the pendency of certain federal court actions filed by the same Plaintiffs. Although no written order was entered, the Court orally informed Plaintiffs' counsel that the motion was well taken and that discovery should be stayed until the Court determined whether these actions could proceed in Circuit Court. On the 7th day of August, 1979, this Court entered its order which held, *inter alia,* that the motion to dismiss filed by Defendants on the grounds of pendency of similar federal action was due to be and the same was denied. Thereafter the Plaintiffs made no further attempts to depose the defendants.

see 830